Clean Water Act by Topic:
Legislation, Regulations, and Cases

Adapted for BLM from:
U.S. Environmental Protection Agency, Case Digest: Clean Water Act, Washington, DC: EPA, National Enforcement Training Institute, 1999.

I. Purpose and History of CWA

Legislation
33 U.S.C. § 1251(a) – The CWA is intended to "maintain the chemical, physical, and biological integrity of the Nation's waters."

Cases
- *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980) – Discussion of statutory framework of the CWA.
- *Texas Oil and Gas Assoc.* v. *EPA*, 161 F.3d 923 (5th Cir. 1998) – Congress enacted the CWA and declared a national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 (33 U.S.C. § 1251(a)(1)). It was designed to achieve this goal through a system of effluent limitations guidelines and National Pollutant Discharge Elimination System permits that set technology-based discharge limits for all categories and subcategories of water pollution point sources.
- *EPA* v. *California*, 426 U.S. 200 (1976) (superceded by statute)– Good summary of the history of the Act.
- *Dubois* v. *U.S.D.A.*, 102 F.3d 1273 – The CWA "incorporated a broad systemic view of the goal of maintaining and improving water quality." In contrast to NEPA's focus on process, the CWA is substantive, focusing upon the "integrity of the Nation's Waters, not the permit process."

Congressional History and Reports
- H.Rep. No 92-911, 92d Cong. 2d Sess. 76-77 (1972) – Subsection (a) of section 101 declares the objective of this legislation to be the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. The word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of the ecosystem is maintained.
- "A Legislative History of the Water Pollution Control Act Amendments of 1972," Congressional Research Service, Library of Congress (January 1973), Serial No. 93-1, Committee Print.
- "A Legislative History of the Water Quality Act of 1987," Congressional Research Services, Library of Congress (November 1988), Committee Print.

II. "Navigable Waters" (§ 502(7))

Legislation
33 U.S.C. § 1362(7) – "navigable waters" means the waters of the United States, including the territorial seas.

Regulations
40 C.F.R. § 122.2 – "Waters of the United States or water of the U.S. means:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (b) All interstate waters, including interstate "wetlands;"
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
>> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>> (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
> (f) The territorial sea; and
> (g) 'Wetlands' adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition."

53 Fed. Reg. 20765 (1988) – Preamble to EPA 404 regulations states that "it should be noted that we generally do not consider the following water to be 'Waters of the United States' [list omitted], however we reserve the right on a case-by-base basis to determine that a particular water body within these categories is water of the United States."

Cases
- *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987) – Navigable waters has been construed expansively to cover waters that are not navigable in the traditional sense.
- *United State* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) – Wetland adjacent to a navigable waterway is part of the waters of the U.S.
- *United States* v. *TGR Corp.*, 171 F.3d 762 (2d Cir. 1999) – Held that a brook into which a slurry was discharged is waters of the U.S. The court rejected defendant's argument that the brook is a "municipal storm sewer" and therefore not waters of the U.S. because testimony at trial showed that the brook was not "owned or operated" by a public body.

- *United State* v. *Edison*, 108 F.3d 1336 (11th Cir. 1997) – Held that it is "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce."
- *United State* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) – The court held that the Corps definition of wetlands which forbade activities that "could affect" interstate commerce, was invalid as it exceeded authority under the Commerce Clause.
- *Quivira Mining Co.* v. *EPA*, 765 F.2d 126 (10th Cir. 1985) – Non-navigable creeks and "arroys" affect interstate commerce because during times of "intense rainfall" there could be a surface connection between these waterways and navigable streams.
- *Treacy* v. *Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003) – Holding that COE jurisdiction under the CWA applies to any branch of a tributary system which eventually flows into a navigable body of water.
- *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) – Finding CWA jurisdiction over wetland adjacent to a roadside ditch that eventually connects to navigable-in-fact water 25 miles away. Cert. denied, 158 L.Ed.2d 466 (2004).
- *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003) – Finding CWA jurisdiction over wetlands 20 miles from navigable-in-fact waters. Cert. denied, 158 L.Ed.2d 467 (2004).

III. "Person" (§ 502(5))

Legislation

33 U.S.C. § 1352(5) – "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

Cases

- *EPA* v. *California*, 426 U.S. 200 (1976) – "Section 301(a) simply makes it 'unlawful' for 'any person' not to have the required permit. That Federal agencies, departments, and instrumentalities are not 'persons' within the meaning of section 301(a) does not mean that federal dischargers are not required to secure NPDES permits. A Federal discharger without a permit is no less out of compliance … than a nonfederal discharger; the Federal discharge is, however, not 'unlawful'."

IV. "Pollutant" (§ 502(6))

Legislation

33 U.S.C. § 1362 (6) – "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. The term does not mean (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

V. Federal Facilities (§ 313)

Legislation
33 U.S.C. § 1323 – Federal facilities provisions.

Cases
- *EPA* v. *California*, 426 U.S. 200 (1976) – "Section 301(a) simply makes it 'unlawful' for 'any person' not to have the required permit. That federal agencies, departments, and instrumentalities are not 'persons' within the meaning of section 301(a) and the Amendments … does not mean either that federal dischargers are not required to secure NPDES permits, or that their obligation to secure an NPDES permit derives from a different provision of the Amendments. A federal discharger without a permit is no less out of compliance … than a nonfederal discharger; the federal discharge is however not 'unlawful'."
- *Marble Mountain Audubon Society* v. *Rice*, 914 F.2d 179 (9th Cir. 1990) – The CWA requires the Forest Service to comply with all State water quality requirements.
- *National Wildlife Federation* v. *Bureau of Land Management*, No. EA A2-026-92-24 (Dept. of Interior, Interior Board of Land Appeals Nov. 18, 1996) – Administrative stay of proposed grazing based on potential impacts on "outstanding natural resource water."

VI. Indian Tribes

Legislation
33 U.S.C. § 1377(a) - Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

Regulations
40 C.F.R. Part 35, Subpart Q – General Assistance Grants to Indian Tribes.
40 C.F.R. § 130.6(d) – Water Quality Management Plans: Indian Tribes.
40 C.F.R. § 131.8 – Requirements for Indian Tribes to administer a water quality standards program.

Cases
- *Montana* v. *EPA*, 137 F.3d 1135 (9th Cir. 1998) – Under section 518 of the CWA, the EPA may authorize Indian tribes to set water quality standards that regulate activities of non-Indians who own property within reservations.

VII. State Certification of Federal Permits (401 Certificate)

Legislation
33 U.S.C. § 1341(a)(1) – "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into navigable waters" shall obtain a certification for the State where the discharge originated "that any such discharges will comply with the applicable provisions of sections 301, 303, and 307" of the CWA.

33 U.S.C. § 1341(d) – State certifications shall "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirements of State law set forth in such certification …."

33 U.S.C. § 1344(t) – "Nothing in [§ 404] shall preclude or deny the right of any State … to control the discharge of dredge or fill material in any portion of the navigable waters within the jurisdiction of such state …."

Regulations
40 C.F.R. § 124.55(e) – Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures in Part 124.

Cases
- *PUD No. 1 of Jefferson Co.* v. *Washington State Dept of Ecology*, 511 U.S. 700 (1994) – Section 401 requires the State to assure compliance with state water quality standards in light of the permitted "activity" not just the "discharger"; thus Washington's minimum stream flow requirement is a permissible condition of a section 401 certification.
- *Citizens Interested in Bull Run* v. *R.L.K. & Co.*, 1998 U.S. App. LEXIS 3926 (9th Cir. 1998) – Dismissal of suit against ski area for discharge of road salt upheld; held that salt in snow that runs off during spring is not an "activity" within the meaning of 401(a), so FS permit need not be certified.
- *Oregon Natural Desert Ass'n* v. *Dombeck*, 151 F.3d 945 (9th Cir. 1998) – Held that 401 certification does not apply to nonpoint source pollutants, such as manure from grazing on public lands; distinguished dam cases (Consumers Power et al.) on grounds that dams are point sources but they don't discharge pollutants.
- *United States* v. *Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989) – If state determines that discharges from certain category of activity will not meet state water quality requirements, the Federal government is prohibited from authorizing the activity by Federal permit.

VIII. State Jurisdiction – also see "Navigable Waters"

Legislation
33 U.S.C. § 1370 – Except as where expressly provided, the CWA should not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

IX. Point Sources

A. "Point Source" (§ 502(14))

Legislation
33 U.S.C. § 1362(14) – "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."

Regulations
40 C.F.R. § 122.2 – "Point source means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."

40 C.F.R. § 122.23(a) – Concentrated animal feeding operations are point sources subject to the NPDES permit program.

Cases
- *Oregon Natural Desert Ass'n* v. *Dombeck*, 151 F.3d 945 (9th Cir. 1998) – Grazing cattle are not point sources.
- *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803 (8th Cir. 1998) – "EPA regulations do not include the logging and road building activities … in the narrow list of silvicultural activities that are point sources requiring NPDES permits."
- *Concerned Area Residents for the Environment* v. *Southveiw Farm*, 34 F.3d 114 (2d Cir 1994) – Held that runoff from the fields to which manure from 700 cattle was applied was not nonpoint source runoff (i.e. is point source).
- *Committee to Save Mokelumne River* v. *East Bay Municipal Utility Dist.*, 13 F.3d 305 (9th Cir. 1993) – Spillway and valve of a dam that channels acid mine runoff from abandoned mine site is considered to be a point source.
- *Oregon Natural Resource Council* v. *U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) – Construction of logging road and bridge is not point source discharge subject to regulation.
- *League of Wilderness Defenders* v. *Forsgren,* 309 F.3d 1181 (9th Cir. 2002) – Holding that the Forest Service's aerial application of a pesticide to control the Douglas Fir Tussock Moth in Oregon and Washington was a point source discharge of pollutants into waters of the United States and, therefore, required an NPDES permit.

B. "Discharge of Pollutants"

Legislation
33 U.S.C. § 1362(12) – "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

Regulations
40 C.F.R. § 401.11(h) – "The term 'discharge of a pollutant(s)' means: (1) The addition of any pollutant to navigable waters from any point source and (2) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other

floating craft. The term 'discharge' includes either the discharge of a single pollutant or the discharge of multiple pollutants."

Cases

- *Miccosukee Tribe* v. *South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), cert. granted __ U.S. __ (June 27, 2003) – Whether diversion of water from runoff canal into another water where point source does not add the pollutant is "addition of a pollutant from a point source."
- *Friends of the Everglades, Inc.* v. *Southern Florida Water Management District*, Case No: 02-80309-CIV-ALTONGA/Bandstra, 2003 U.S. Dist. Lexis 13827 (S.D. Fl. Jul. 1, 2003) – Staying proceedings involving whether back pumping requires a permit until *Miccosukee* is decided.
- *Northern Plains Res. Council* v. *Fidelity Development & Exploration Co.*, F3d 1155 (9th Cir. April 10, 2003) – Discharge of groundwater into surface water constituted discharge of pollutants.

C. NPDES Permits

Legislation

33 U.S.C. § 1342(a)(1) – "[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants … upon condition that such discharge will meet either (A) all applicable requirements [of the Act], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."

33 U.S.C. § 1342(a)(2) – "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."

33 U.S.C. § 1342(b) – State permit programs.

Regulations

40 C.F.R. § 122.6 – Continuation of Expiring Permits.

40 C.F.R. § 122.47 – Schedules of Compliance.

40 C.F.R. § 122.3 – Activities not requiring NPDES permit.

40 C.F.R. § 122.62 – Modification or revocation and reissuance of permits.

40 C.F.R. § 122.4 – Conditions under which no NPDES permit may be issued.

D. Effluent Guidelines (§ 304(b))

Legislation
33 U.S.C. § 1314(b) – Requires the EPA to issue "regulations providing guidelines for effluent limitations."

33 U.S.C. § 1314 (m)(1)(C) – Requires the EPA to identify and categorize all point sources warranting effluent guidelines.

Regulations
40 C.F.R. § 125.3(c) – Methods of imposing technology-based treatment requirements in permits.

Cases
- *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980) – Discusses the basis of effluent guidelines to limit the discharge of pollutants.
- *DuPont* v. *Train*, 430 U.S. 112 (1977) – Upheld the EPA's authority to promulgate effluent guidelines under § 301 and § 304.
- *Texas Oil & Gas Assoc.* v. *EPA*, 161 F.3d 923 (5th Cir. 1998) – The CWA was designed to achieve its goals of cleaning the nation's waters through a system of effluent limit guidelines and NPDES permits.
- *American Paper Institute* v. *EPA*, 996 F.2d 346 (D.C. Cir. 1993) – The "rubber hits the road" only when effluent limit guidelines are incorporated into NPDES permits.
- *Carr* v. *Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991) – "Among other conditions, an NPDES permit must incorporate effluent limitations for point sources based on guidelines 'promulgated by EPA on an industry-by-industry basis … .' The guidelines do not specify the use of a particular technology; rather they establish effluent limitations that can be achieved only through the use of a certain quality of technology."

E. Best Available Technology ("BAT")

Legislation
33 U.S.C. § 1314(b)(2)(A) – By 1983 "effluent limitations for categories and classes of point sources" are to be achieved which will require "application of the best available technology economically achievable for such category or class."

33 U.S.C. § 1314(b)(2)(B) – "Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the techniques, process changes, the cost of achieving such effluent reductions, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate …"

Regulations
40 C.F.R. § 125.3(d)(3) – The EPA shall take into account (or apply) certain factors in making a BAT determination, including "the age of equipment and facilities involved."

Cases

- *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980) – "In assessing BAT, total cost is [not] to be considered in comparison to effluent reduction benefits."

F. Best Practicable Technology (BPT)

Legislation

33 U.S.C. § 1311(b)(1) – BPT.

Cases

- *Texas Oil & Gas Assoc.* v. *EPA*, 161 F3d 923 (5th Cir. 1998) – "BPT" is the CWA's least stringent standard.

G. New Sources

Legislation

33 U.S.C. § 1306(a)(2) – "New source" means "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section."

Regulations

40 C.F.R. § 122.2 – "New Source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants,: the construction of which commenced: (a) After promulgation of standards of performance under section 306 of the CWA which are applicable to such source, or (b) After proposal of standards of performance in accordance with section 306 of the CWA which are applicable to such sources, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal."

40 C.F.R. § 122.29(b) – Definition of new sources for purposes of preparing environmental assessments.

H. Effluent Limitations (§ 502(11))

Legislation

33 U.S.C. § 1362 (11) – "effluent limitation" is "any restriction … on quantities, rates, and concentration of chemical, physical, biological, and other constituents which are discharged from point sources …."

Cases

- *Texas Oil & Gas Assoc.* v. *EPA*, 161 F3d 923 (5th Cir. 1998) – Effluent limitations described in 502(11) are "technology-based rather than harm-based; that is, they reflect the capabilities of available pollution control technologies to prevent or limit different discharges rather than the impact that those discharges have on the waters."

X. Toxic Pollution

Regulations
40 C.F.R. § 125.3(c)(4) – Limits may be expressed, where appropriate, in terms of toxicity.

40 C.F.R. § 129 – Toxic Pollutant Effluent Standards.

XI. Publicly Owned Treatment Works (POTWs)

Legislation
33 U.S.C. § 1311(b)(1)(B) – POTWs shall meet secondary treatment standards by July 1, 1977.

Regulations
40 C.F.R. § 122.2 – "Publicly owned treatment works (POTW) means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a 'State' or 'municipality.' This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment."

A. Pretreatment

Legislation
33 U.S.C. § 1317(b) – Pretreatment authority.

33 U.S.C. § 1342(a)(3) and (b)(8) – Authority to delegate to municipalities.

33 U.S.C. § 1319(f) – Wrongful introduction of pollutants into treatment works.

Regulations
40 C.F.R. Part 403 – General Pretreatment Regulation for Existing and New Sources of Pollution.

B. Secondary Treatment Standards

Regulations
40 C.F.R. Part 133 – Secondary Treatment Regulation.

XII. Water Quality Standards

A. General

Legislation
33 U.S.C. § 131 – Water quality standards and implementation plans.

Regulations
40 C.F.R. Parts 130 and 131 – Water Quality Planning and Management and Water Quality Standards.

Cases
- *PUD No 1 of Jefferson Co.* v. *Washington State Dept of Ecology*, 511 U.S. 700 (1994) – State "water quality standards provide 'a supplemental basis … so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'"
- *Sierra Club* v. *Union Oil Co. of Calif.*, 813 F.2d 1480 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988) – "States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designated to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water … Water quality-based limitations relate to the environmental effects of different effluent levels."
- *Northwest Indian Cemetery Protective Ass'n* v. *Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983) – Under section 33, Federal agencies must comply with state water quality standards.

B. Antidegradation

Legislation
33 U.S.C. § 1313(c) – Statutory authority for antidegradation regulations.

33 U.S.C. § 131(d)(4)(B) – Water quality standards may be revised only where consistent with antidegradation policy.

Regulations
40 C.F.R. § 122.4(i) – No permit shall be issued to a new source or new discharger where the discharge will cause or contribute to violations of water quality standards unless applicant can prove the TMDL provides a sufficient load allocation and no net decrease in water quality will result.

40 C.F.R. § 131.12 – Antidegradation Policy.

Cases
- *PUD No 1 of Jefferson Co.* v. *Washington State Dept of Ecology*, 511 U.S. 700 (1994) – "States must interpret their antidegradation policy in a manner 'consistent' with existing uses of the stream … the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an 'existing instream water use' will be 'maintained and protected.'"
- *Manasota-88, Inc.* v. *Tidwell*, 896 F.2d 1318 (11th Cir., 1990) – "Each state must adopt as part of its water quality standards an 'antidegradation policy' consistent with and at least as stringent as the Federal antidegradation rule. For outstanding national resource waters (ONRW) such as national or state parks, wildlife refuges, and waters of exceptional recreational or ecological significance, the quality of the waters must be maintained and protected under all circumstances."

C. Designated Uses

Regulations
40 C.F.R. § 131.10 – Designation of Uses.

Cases
- *PUD No 1 of Jefferson Co.* v. *Washington State Dept of Ecology*, 511 U.S. 700 (1994) – "A state water quality standard 'shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.'"
- *Miccosukee Tribe of Indians of Fl.* v. *EPA*, 105 F.3d 599 (11th Cir. 1997) – "The Administrator must determine whether [state] standards are scientifically defensible and protective of designated uses."
- *Natural Resources Defense Council, Inc.* v. *EPA*, 16 F.3d 1395 (4th Cir. 1993) – "[T]he following three factors are considered when adopting or evaluating a water quality standard: (1) one or more designated uses of the states involved; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or narrative statements representing a quality of water that supports a particular designated uses; and (3) an antidegradation policy to protect existing uses and high quality waters."

D. EPA Review of State Standards

Legislation
33 U.S.C. § 1313(c) – Review; revised standards; publication.

Regulations
40 C.F.R. § 131.5(a) – "Under section 303(c) of the Act, the EPA is to review and to approve or disapprove State-adopted water quality standards …"

40 C.F.R. § 131.6 – Minimum requirements for water quality standards submissions.

40 C.F.R. § 131.21(c) – "A State water quality standard remains in effect, even though disapproved by EPA, until the State revises it or the EPA promulgates a rule that supersedes the State water quality standard."

Cases
- *National Wildlife Federation* v. *Browner*, 127 F.3d 1126 (D.C. Cir. 1997) – EPA's state water quality standards review provision, required only that the EPA review state revisions, not existing state standards.
- *Natural Resources Defense Council* v. *EPA*, 16 F.3d 1395 (4th Cir. 1993) – States have the primary role in establishing water quality standards, and the EPA's sole function is to review those standards for approval and determine whether the state's decisions are scientifically defensible and protective of designated uses.
- *Northwest Environmental Advocates* v. *EPA*, 268 F. Supp 2d 1265 (D. Or. March 31, 2003) – The EPA has a nondiscretionary duty to promulgate water temperature criteria for the Williamette River in place of inadequate state standards.

E. "Fishable, Swimmable"

Legislation
33 U.S.C. § 1251(a)(2) – "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."

Cases
- *Natural Resources Defense Council* v. *EPA*, 16 F.3d 1395 (4th Cir. 1993) – Each submission by a state of its water quality standards to the EPA for approval must "contain six elements … (6) general information to assist the EPA in determining the adequacy of the scientific basis for standards that do not include the 'fishable/swimmable' uses …"

F. State Authority

Legislation
33 U.S.C. § 131.11(b)(1)(ii) – States may not impose standards that are less strict than federal standards, but nothing in the CWA shall limit the state's authority to promulgate water quality standards that are stricter than minimum federal standards.

33 U.S.C. § 1344(t) – "Nothing in [§ 404] shall preclude or deny the right of any state … to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction or such State …."

Cases
- *New Hanover Township* v. *Corps of Engineers*, 992 F.2d 470 (3rd Cir. 1993) – "Pennsylvania is empowered by the Clean Water Act to set more stringent water quality standards than those set by the Act and its regulations."
- *United States* v. Marathon Development Corp., 867 F.2d 96 (1st Cir. 1989) – States may deny certification of a nationwide wetland permit in order to enforce their more stringent water quality standards.

G. Impaired Water Bodies (§ 303(d))

Legislation
33 U.S.C. § 1313(d) – "Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters."

Regulations
40 C.F.R. Part 130 – Water Quality Planning and Management.

Cases

- *Dioxin/Organochlorine Center* v. *Clarke*, 57 F.3d 1517 (9th Cir. 1995) - Held that section 303(d) allows the EPA to establish TMDLs for water contaminated with toxic pollutants without prior development of BAT limitations; distinguished with *NRDC* v. *EPA* holding that dealt only with the question of whether waters contaminated by toxics *had* to be listed under section 303(d), not whether they *may* be listed.
- *Natural Resources Defense Council* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990) – "Section 1313(d) … requires States to identify only those waters for which limitations based on the best practicable technology would not be stringent enough to implement the water quality standards. Those waters for which limitations based on the more demanding best available technology – the required level of technology to control toxics – were insufficient and did not have to be listed."

H. TMDLs

Legislation

33 U.S.C. § 1313(d)(1)(C) – Required each state to develop total maximum daily loads (TMDLs) for each water body that cannot meet water quality standards after point sources are subjected to technology-based effluent standards.

Regulations

40 C.F.R. § 122.4(i) – No permit shall be issues to a new source or new discharger where the discharge will cause or contribute to violations of water quality standards unless applicant can prove the TMDL provides a sufficient load allocation and no net decrease in water quality will result.

40 C.F.R. § 130.2(i) – Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be less stringent. Thus, the TMDL process provides for nonpoint control trade-offs.

40 C.F.R. § 1307 – Total maximum daily loads and individual water quality-based effluent limitations.

Cases

- *Friends of Wild Swan* v. *EPA*, No 00-36001, 2003 LEXIS 15271 (9th Cir. July, 2003) – Upholding district court's order for the EPA to establish TMDLs according to schedule.
- *Miccosukee Tribe* v. *United States*, 105 F.3d 599 (11th Cir. 1997) – Applying § 303(d) regarding state promulgation of water quality standards and concluding that "even if a state fails to submit new or revised standards [to EPA], a change in state water quality standards could invoke the mandatory duty imposed on the Administration to review new or revised standards."

- *Dioxin/Organochlorine Center* v. *Clarke*, 57 F.3d 1517 (9th Cir. 1995) - The court rejected the claim by industry that no TMDL for dioxin could be established because there are no technology-based effluent guidelines for dioxin.
- *Scott* v. *Hammond*, 741 F.2d 992 (7th Cir. 1984)- If a state fails over a long period of time to submit proposed TMDL, prolonged failure may amount to "constructive submission" by the state of no TMDLs, and theEPA may be under duty to either approve or disapprove this "submission."
- *Defend the Bay* v. *Marcus*, No. 97-3997 (N.D. Cal. 1999) – In a consent decree, EPA agrees to set a schedule for TMDLs for 156 waterways in Los Angeles and Ventura counties of California.

XIV. Best Management Practices

Legislation
33 U.S.C. § 1314(e) – Best Management Practices for Industry.

33 U.S.C. § 1342(a)(2) – "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."

Regulations
40 C.F.R. § 122.44(k)(2), (3) – BMPs are to be used "to control or abate the discharge of pollutants when … (n)umeric effluent limitations are infeasible … or … (t)he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purpose and intent of the [CWA]."

40 C.F.R. § 125.1000 et seq. – Subpart K – Criteria and Standards for Best Management Practices Authorized under Section 304(e) of the Act.

40 C.F.R. § 130.2(m) – "Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during, and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters."

Cases
- *Rybackek* v. *EPA*, 904 F.2d 1276 (9th Cir. 1990) – The EPA is authorized to establish best management practices "to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage" in order to diminish the amount of toxic pollutants flowing into receiving waters.

XV. Wetlands (§ 404)

A. Generally

Legislation
33 U.S.C. § 1344 – Permits for dredge or fill material.

33 U.S.C. § 1344(t) – "Nothing in [§ 404] shall preclude or deny the right of any State … to control the discharge of dredge or fill material in any portion of the navigable waters within the jurisdiction of such State …."

Regulations
40 C.F.R. § 122.2 – "Wetlands" means those areas that are inundated or saturated by surface of groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. § 230 – Guidelines for Specification of Disposal Sites for Dredge or Filled Materials.

40 C.F.R. § 231 – Section 404(c) Procedures.

40 C.F.R. § 232 – 404 Program Definitions; Exempt Activities Not requiring 404 Permits.

40 C.F.R. § 233 – 404 State Program Regulations.

33 C.F.R. § 321 – Permits for Dams and Dikes in Navigable Waters of the United States.

33 C.F.R. § 322 – Permits for Structures or Work in Or Affecting Navigable Waters of the United States.

33 C.F.R. § 323 – Permits for Discharges of Dredged or Fill Material into Waters of the United States.

33 C.F.R. § 328.3(b) – Corps's definition of "wetlands."

B. Adjacent Wetlands

Legislation
33 C.F.R. § 328.3(c) – The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent wetlands.

Cases

- *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) – Upheld the Corps's application of § 404 permit requirements to adjacent wetlands; "the landward limit of Federal jurisdiction under § 404 must include any adjacent wetlands that form the border or are in reasonable proximity to other waters of the United States."
- *United* States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) – The court held that Corps definition of wetlands, which forbade activities that "could affect" interstate commerce, was invalid; "The regulation [33 CFR 328.3(a)(3)] requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause."
- *Hobbs* v. *United States*, 1991 U.S. App. LEXIS 27696 (4th Cir. 1991) – Land held to be adjacent wetland even though not directly abutting waters of the United States.
- *United States* v. *Tilton*, 705 F.2d 429 (11th Cir. 1983) – Even without direct or indirect surface connection between wetlands in question and adjacent river, area came under wetlands definition.

C. Alternatives Analysis

Legislation

33 U.S.C. § 1344(b) – Requires development of guidelines that consider, among other things, "economic impact of the site on navigation and anchorage."

Regulations

40 C.F.R. § 230.10(a) – Where "there is a practicable alternative … which would have less adverse impact on the aquatic ecosystem," the Corps cannot issue a dredge or fill permit.

40 C.F.R. § 230.10(c) – "No discharge of dredge or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States."

Cases

- *B&B Partnership* v. *United States*, 133 F.3d 913 (4th Cir. 1997), reported in full at 1997 U.S. App. LEXIS 36,086 – Upheld Corps decision to deny 404 permit on the grounds that environmental impact to land outweighed public benefits of proposed landfill.
- *Norfolk* v. *United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992) – Basic proposition of CWA law is that if mitigation measures are insufficient, the permit should be denied.

D. Draining Wetlands

Legislation

33 U.S.C. § 1344(f)(1)(A) – "[T]he discharge of dredged or fill material … from … minor drainage … is not prohibited …."

Regulations
40 C.F.R. § 232.3(d)(3)(ii) – "Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g. wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland to another (for example, silviculture to farming)."

Cases
- *Save Our Community* v. *EPA*, 971 F.2d 1155 (5th Cir. 1992) – Challenge to draining of wetlands dismissed on grounds that draining is not a dredge and fill subject to regulation and therefore requires no permit; "We must conclude that without the existence of an effluent discharge of some kind, there is no coverage under section 404."

E. Dredge and Fill

Legislation
33 U.S.C. § 1344(a) – "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredge or fill material into the navigable waters at specified disposal sites."

33 U.S.C. § 1344(t) – "Nothing in [§ 404] shall preclude or deny the right of any State … to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State …."

Regulations
33 C.F.R. § 323.2.(c) – "The term *dredged material* means material that is excavated or dredged from waters of the United States."

33 C.F.R. § 323.2(d) – definition of "discharge of dredged material."

33 C.F.R. § 323.2(e) – "The term *fill material* means any material used for the primary purpose of replacing an aquatic area with dry land or of hanging the bottom elevation of a waterway. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the CWA."

40 C.F.R. § 230.1(c) – "Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystem of concern."

40 C.F.R. § 232.2 – Definitions.

Cases

- *Resource Investments Inc.* v. *U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) – Corps does not have the authority under 404 to stop proposed landfill because refuse to be disposed of in the landfill does not constitute "dredge and fill material"; the landfill does not meet the test of the Corps regulations for "material that is excavated or dredged from the waters of the United States"; authority to regulate solid waste rests with the EPA.
- *West Virginia Coal Ass'n* v. *Reilly*, 932 F.2d 964 (4th Cir. 1991), full-text slip opinion reported at 1991 U.S. App. LEXIS 9401 – The court rejected the argument that Corps, not the EPA, should regulated discharge of mining wastes into navigable waters. "Generally, the Army has authority over the discharge [of] fill while the EPA has authority over the discharge of pollutants. … Appellants' analysis falls short, however, since the Army regulations, 33 CFR § 323(e), provide evidence that it did not intend to regulate the disposal of mining related spoil since the primary purpose of such fill and treatment ponds is to dispose of waste and treat sediment-laden water, not to create dry land or to change the bottom elevation of the water."

F. Exemptions (§ 404(f))

Legislation

33 U.S.C. § 1344(f)(1)(A) – "The discharge of dredge or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices … is not prohibited or otherwise subject to regulation …."

33 U.S.C. § 1344(f)(1)(E) – "The discharge of dredged or fill material … for the purposes of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized … is not prohibited by or otherwise subject to regulation …."

Regulations

33 C.F.R. § 328.3(a)(8) – Defines prior converted wetlands as those areas "that before December 23, 1985, where drained, dredged, filled, leveled, or otherwise manipulated … for the purpose, or to have the effect of, or making production of an agricultural commodity possible and an agricultural commodity has been produced at least once before December 23, 1995."

Cases

- *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803 (8th Cir. 1998) – Suit challenging logging sale by the Forest Service is dismissed; "[L]ogging and associated road building are exempt from dredge and fill permit requirements so long as construction and maintenance comply with best management practices … The administrative record contains no evidence those practices have not been followed."

G. Isolated Wetlands

Cases

- Adjacent wetlands are covered (*United States* v. *Riverside Bayview Homes*), but isolated wetlands where the sole connection is migratory birds are not (*Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*).
- *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) - § 404 of CWA, requiring permit from Army Corps of Engineers for discharge of fill material into navigable waters, held not to extend to isolated, abandoned sand and gravel pit with seasonal ponds which provided migratory bird habitat.

H. Nationwide Permits

Legislation

33 C.F.R. § 330.5 – Nationwide Permits.

Cases

- *United States* v. *Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) – States may deny certification of a nationwide wetland permit in order to enforce their more stringent water quality standards.

I. EPA Veto of Corp.-Issues Permits (§ 404(c))

Legislation

33 U.S.C. § 1344(c) – Denial or restriction of use of defined areas as disposal areas.

Regulations

40 C.F.R. Part 231 – Section 404(c) Procedures.

Cases

- *Hoffman Homes Inc.* v. *EPA*, 961 F.2d 1310 (7th Cir. 1992), vacated for rehearing, 975 F.2d 1154 (7th Cir. 1992) – "The EPA … has a veto power over the issuance of permits when it determines, after consulting with the Corps, that the dredging or fill materials 'will have an unacceptable adverse effect on municipal water supplies, shellfish beds …, wildlife, or recreational areas."
- *Holy Cross Wilderness Fund* v. *Madigan*, 960 F.2d 1515 (10th Cir. 1992) – "The EPA may veto the issuance of a permit which will have an 'unacceptable adverse effect" on a wetland ecosystem."

XVI. Storm Water

Legislation

33 U.S.C. § 1342(l)(2) – Storm water runoff from oil, gas and mining.

33 U.S.C. § 1342(p) – Municipal and Industrial Storm Water Discharges.

Regulations
40 C.F.R. § 122.26 – Storm Water Discharges.

Cases
- *Defenders of Wildlife* v. *Browner*, 1999 U.S. App. LEXIS 22212 (9th Cir. 1999) – Held that the EPA did not act in an arbitrary and capricious manner by not requiring municipal storm water permits to include numeric effluent limits designed to ensure compliance with state water quality standards; the EPA has discretion to use BMPs instead; "the [CWA] did not require municipal storm sewer discharges to comply strictly with [effluent limitations] … [I]ndustrial dischargers must comply strictly with state water-quality standards. Congress chose not to include a similar provision for municipal storm-sewer discharges."
- *American Mining Congress* v. *EPA*, 965 F.2d 759 (9th Cir. 1992) – Upheld provisions of the EPA's storm water rule which classifies storm water discharges from inactive mines as "associated with industrial activity" and thus subject to NPDES permitting under CWA § 402(p).
- *San Francisco Baykeeper* v. *Tidewater Sand & Gravel Co.*, 1997 U.S. Dist. LEXIS 22,602, 46 ERC (BNA) 1778 (N.D. Ca. 1997) – Discharge from defendants sand & gravel operation held to be "associated with industrial" activity under 40 C.F.R. § 122.26(c)(1).

XVII. Concentrated Animal Feeding Operations (CAFOs)

Legislation
33 U.S.C. § 1362(14) – "The term point source [includes] … concentrated animal feeding operation."

Regulations
40 C.F.R. § 122.21(i) – NPDES permit application requirements for CAFOs.

40 C.F.R. § 122.23(a)(3) and Part 122 Appendix B – Definition of CAFOs.

40 C.F.R. Part 412 – Feedlot Point Source Category.

Cases
- *Concerned Area Residents for the Environment* v. *Southview Farm*, 34 F.3d 114 (2d Cir. 1994) – Held that dairy farm with 700 cattle that lived in barns was a CAFO and the runoff from the fields to which their manure was applied was not nonpoint source runoff.

XVIII. Mining

Legislation
33 U.S.C. § 1288(b)(2)(G) – Area wide waste management plans shall include "a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine run-off and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources."

33 U.S.C. § 1342(l)(2) – Storm water runoff from oil, gas and mining.

Regulations
40 C.F.R. § 122.26(b)(10) – Storm water regulation definition of overburden.

40 C.F.R. § 122.26(b)(14)(iii) – "Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations …"

40 C.F.R. § 130.6(c)(4)(iii)(D) – "BMPs shall be identified for the nonpoint sources identified in section 208(b)(2)(F)-(K) of the Act and other nonpoint source as follows: … Identification of procedures to control mine-related source of pollution in accordance with section 208(b)(2)(G) of the Act."

40 C.F.R. Part 440 – Effluent Guidelines and Standards for Ore Mining and Dressing Point Source Category.

Cases
- *Committee to Save Mokelumne River* v. *East Bay Util.*, 13 F.3d 305 (9th Cir. 1993) – Acid mine drainage is sufficient to satisfy the definition of "pollutant" under the CWA.
- *American Mining Congress* v. *EPA*, 965 F.2d 759 (9th Cir. 1992) – Upheld provisions of the EPA's storm water rule which classifies storm water discharges from inactive mines as "associated with industrial activity" and thus subject to NPDES permitting under § 402(p) of the CWA.

XIX. Oil and Gas

Legislation
33 U.S.C. § 1342(l)(2) – Storm water runoff from oil, gas and mining.

Regulations
40 C.F.R. Part 435, Subpart D – Coastal subcategory effluent limitation guidelines.

Cases
- *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) – Produced water held to be a pollutant.

XX. Oil Spills (§ 311)

Legislation
33 U.S.C. § 1321(b)(6) – Administrative penalty provisions.

33 U.S.C. § 1321(b)(7) – civil penalty provisions: "Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or hazardous substance is discharged in violation of paragraph (3), shall be subject o civil penalty …."

Regulations
40 C.F.R. Part 109 – Criteria for State, Local, and Regional Pollution Contingency Plans.

40 C.F.R. Part 110 – Discharge of Oil.

40 C.F.R. Part 112 – Oil Pollution Prevention.

40 C.F.R. Part 116 – Designation of Hazardous Substances.

40 C.F.R. Part 117 – Determination of Reportable Quantities of Hazardous Substances.

40 C.F.R. Part 138 – Financial Responsibility for Water Pollution.

33 C.F.R. Part 133 – Oil Spill Liability Trust Fund: State Access.

33 C.F.R. 136 – Oil Spill Liability Trust Fund: Claims Procedures, Designation of Sources, and Advertisement.

XXI. Ground Water, Discharge To

Regulations
40 C.F.R. § 130.6(c)(9) – Water Quality Management Plans: Groundwater.

Cases
- *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994) – Discharge to artificial ponds connected only to groundwater are not regulated under the CWA.
- *Town of Norfolk* v. *Corp. Engineers*, 968 F.2d 1438 (1st Cir. 1992) – held that the CWA's permitting provisions do not apply to any groundwater, deferring to Corps definition, which limited CWA coverage to surface waters.
- *Quivira Mining Co.* v. *EPA*, 765 F.2d 126 (10th Cir. 1985) – Affirmed the EPA's decision that a CWA permit was required for discharges of pollutants into surface arroyos which, during storms, channeled rainwater both directly to navigable-in-fact streams and into underground aquifers that connected with such streams.

XXII. CWA Relationship to the Coastal Zone Management Act

Regulations
40 C.F.R. § 122.49(d) – The CZMA and implementing regulations (15 C.F.R. Part 930) prohibit the EPA from issuing a permit for an activity affecting land or water use in the coastal zone until the applicant certifies that the proposed activity complies with the State Coastal Zone Management program, and the State or its designated agency concurs with the certification.